No. 82-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,
Petitioners

v.

LAJOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF REVERSAL

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") submits its brief *amicus curiae* in support of petitioners Escondido Mutual Water Company, City of Escondido and Vista Irrigation District. Petitioners ask the Court to reverse the decision by the United States Court of Appeals for the Ninth Circuit in *Escondido Mutual Water Co.* v. *FERC*, 692 F.2d 1223 (1982), *modified on denial of reh'g*, 701 F.2d 826 (1983). Pursuant to Rule 36.2 of the Court's rules, EEI has obtained the written consent of all parties to the filing of this brief. The consents have been filed with the Clerk of the Court.

I. INTEREST OF AMICUS CURIAE

EEI is the national association of electric utility companies. EEI's members generate 76 percent of the United States' electric energy and serve more than 77 percent of the nation's electric consumers.

This case has considerable importance to EEI member companies. As of December 1, 1983, 65 EEI member companies held 354 licenses issued by the Federal Energy Regulatory Commission for hydroelectric projects under the Federal Power Act, 16 U.S.C. § 791a *et seq.*[1] A number of these projects are located on federal reservations, including Indian lands and national forests. The Court of Appeals held that whenever a federal reservation *may be affected* by a project, Section 4(e) of the Act, 16 U.S.C. § 797(e), requires the Commission to impose in the license whatever conditions the responsible departmental Secretary *unilaterally* deems "necessary for the adequate protection and utilization of" the reservation.

The Court of Appeals' decision has serious adverse implications for those members of EEI who have invested capital in these hydroelectric projects as well as for nearly all of the other members who, from time to time, share in the benefits of inexpensive water power as a result of the interconnected transmission grid. In the proceedings below the Commission's administrative law judge concluded that the Secretary of Interior's unilateral conditions were "designed . . . to destroy" a project which had been in existence for many years. *See* Joint Appendix at 300; 6 F.E.R.C. ¶ 63,008 at 65,074-75 (CCH 1977). If the Commission is forced to adopt such conditions without any opportunity for consideration or modification in the light of broad public interest in the use of the nation's hydroelectric resources, then the future availability of a considerable portion of those hydroelectric resources will be jeopardized. In addition, EEI is concerned that the decision below could be wrongly construed to apply to relicensing as well as to the initial licensing context of this case. Such an interpretation would be inconsistent with the Act and would lead to

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[1] The agency is referred to below as the "Commission" or "FERC." The Federal Power Act is referred to as "the Act" or "FPA."

substantial uncertainty and litigation when many of the member companies' licenses expire.

II. SUMMARY OF ARGUMENT

This Court should reverse the decision of the Court of Appeals.[2] The Federal Power Act as interpreted by this Court places in the Commission comprehensive licensing jurisdiction over hydroelectric projects. As this Court has emphasized, Congress chose the Commission as the agency to control hydroelectric licensing. It is the Commission, therefore, which must make the ultimate administrative determination as to those license conditions which are required by Section 4(e) of the Act "for the adequate protection and utilization of" federal reservations. The Court of Appeals' interpretation of Section 4(e), on the other hand, strips the Commission of that responsibility and resurrects the fragmented pattern of regulation that the Federal Power Act was intended to change. Moreover, aside from its inconsistency with this Court's decisions, the Court of Appeals' decision conflicts with a decision of another circuit court construing related provisions of the Federal Power Act.

The Court of Appeals also erred in extending Section 4(e) far beyond its intended purpose. Contrary to that court's interpretation of the statute, projects located outside of a federal reservation but which affect or might in the future affect reserved water rights of a federal reservation are not "within any reservation" within the meaning of Section 4(e) of the Act.

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[2] EEI believes the Court of Appeals wrongly decided each of the three questions presented in the Petition for a Writ of Certiorari. EEI, however, is not briefing the question which relates to the Mission Indian Relief Act, the Act of January 12, 1891, 26 Stat. 712.

III. ARGUMENT

A. The Court Of Appeals' Construction Of Section 4(e)'s Reservations Provisio Is Erroneous

1. *The Court's Decision Defeats The Statutory Plan Congress Envisioned*

The proviso of FPA Section 4(e) at issue here reads:

> [L]icenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

The Court of Appeals said that the words "shall be subject to and contain such conditions" make the departmental Secretaries' proposed conditions obligatory on FERC. The court concluded that the "plain meaning rule" requires this result even where the Commission finds a proposed condition infeasible or unnecessary.

The "plain meaning" rule does not require this. Rather, as this Court has explained, it is

> fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling [the Court's] responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

Richards v. *United States*, 369 U.S. 1, 11 (1962) (footnotes omitted). Indeed, this was the same approach the Court followed in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975). Like this case, *Chemehuevi* also involved interpretation of FPA Section 4(e). And despite a "plain meaning" argument that was not without

some persuasive force, the Court said the argument "is refuted when § 4(e) is read together with the rest of the Act, as, of course, it must be." *Id.* at 403. That is precisely the case here as well.

a. *The Commission Is The Final Administrative Authority Under Section 4(e)*

Prior to 1920, hydroelectric licensing responsibility was scattered among three executive departments—Agriculture, Interior and War. Each department operated autonomously and their separate interests dictated hydroelectric licensing policy.[3] The result of this fragmented regime was to discourage the private investment necessary to develop water power resources. *See First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 180 (1946).

Congress' solution was to establish a single agency charged with balancing the various public interest considerations in the licensing of hydroelectric projects. The Federal Water Power Act of 1920, 41 Stat. 1063,[4] lodged all water power licensing authority in a single agency composed of the Secretaries of Agriculture, Interior and War. Congressman Lee, a member of the Conference Committee that reported the bill that became the 1920 Act, summarized the statute's central purpose:

> Under the provisions of the bill now agreed upon, all water powers over which the United States has

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[3] Prior to the adoption of the Federal Water Power Act, licensing authority was vested in three separate agencies: the Secretary of War had authority under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403, and the Act of June 23, 1910 (36 Stat. 593); the Secretary of Agriculture had authority over certain hydroelectric projects under the Act of February 1, 1905 (33 Stat. 628); and the Secretary of Interior had authority over projects built on lands under his control, J. Kerwin, *Federal Water-Power Legislation* 105-114 (1926).

[4] The Federal Water Power Act was reenacted in 1935, with various modifications not relevant here, as Part I of the Federal Power Act. *See* 49 Stat. 838.

> any jurisdiction will hereinafter be administered by a commission composed of the Secretaries of War, Interior and Agriculture, a measure by which duplication of work may be avoided, *a common policy pursued and the combined efforts of the three Departments directed toward a constructive National program* of intelligent economical utilization of our water-power resources.

59 *Cong. Rec.* 6527 (May 4, 1920).[5]

Under Section 4(e) of the 1920 Act the Commission alone is authorized to issue licenses for power projects on streams over which Congress has jurisdiction and "upon any part of the public lands and reservations of the United States."[6] In issuing initial licenses, Section 4(e) requires the Commission itself to find that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Similarly, Section 10(a), 16 U.S.C. § 803(a), requires licenses to reflect "the judgment of the Commission" as to the terms and conditions necessary for a project to be "best adapted to a comprehensive plan for improving or developing a waterway or waterways."

The Commission's paramount authority to exercise its judgment in implementing the Act's standards is further underscored by FPA Section 6, 12 U.S.C. § 799. It provides that each license

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[5] Emphasis is supplied throughout this brief. *See also* S. Rep. No. 180, 66th Cong., 1st Sess. (1919) and H.R. Rep. No. 61, 66th Cong., 1st Sess. (1919).

[6] FPA § 3(2) defines "reservations" as:

> national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

> shall be conditioned upon acceptance by the licensee of all the *terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter.*

As this language makes clear, licenses contain two categories of conditions—those automatically imposed on a licensee by various FPA provisions and those "the Commission shall prescribe." Unlike other portions of the Act,[7] however, the Section 4(e) reservations proviso contains no automatic or self-implementing "terms and conditions." Rather, conditions which a departmental Secretary considers necessary under Section 4(e) fall into the secondary category—those which "the Commission shall prescribe."

The fundamental statutory plan is to make the Commission the final administrative authority with respect to all license conditions. To be sure, the Commission must give careful consideration to a departmental Secretary's position regarding the Section 4(e) conditions a license shall "be subject to and contain." If the Commission, in light of each of the public interest considerations contained in the Act, finds a Secretary's conditions necessary "for the adequate protection and utilization of" the reservation, the Commission must include them in the license. One agency, however, must have the final administrative word on this point. This is because the power to condition is tantamount to the power to approve or deny a license. And "[i]t is the Commission's judgment on which Congress has placed its reliance for control of licenses." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

The selection of the Commission rather than the departmental Secretary as the final administrative authority goes to the heart of Congress' intent in enacting the

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[7] The following sections of the Act, for example, contain provisions which automatically become conditions in every major license (1500 kilowatts or larger) issued by the Commission: §§ 6, 8-10, 13-16, 18-20 and 26, 16 U.S.C. §§ 799, 801-03, 806-09, 811-13 and 820.

Federal Water Power Act in 1920. Congress wanted to end the fragmented approach of the past in which each department's parochial interests controlled licensing. Indeed, as this Court has explained, the FPA was intended as

> a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, *instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts, and other federal laws previously enacted.*

First Iowa Hydro-Electric Cooperative, supra at 180.[8]

b. *Other FPA Provisions Support This Interpretation*

Another portion of Section 4(e) bars the Commission from issuing any license affecting navigable waters "until the plans of the dam . . . have been approved by the Chief of Engineers and the Secretary of the Army." If Congress had intended that the Section 4(e) conditions of the appropriate departmental Secretary would have the force and effect ascribed to them by the Court of Appeals, then it makes no sense for the Congress not to have given those Secretaries the same approval powers it gave to the Secretary of the Army later in the same section of the Act.

The power to impose license conditions for the "protection and utilization" of a reservation is tantamount to the power to approve or disapprove a project. In Section 4(e) Congress stopped considerably short of granting such approval power to the departmental Secretaries in the case of projects to be located within a reservation. Similarly, in FPA Section 18, 16 U.S.C. § 811, Congress also stopped considerably short of granting various de-

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[8] *See also FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965); *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); and *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 167-72 (1953).

partment heads the power to condition licenses. The department heads identified in Section 18 are permitted to prescribe the construction, operation and maintenance of "lights and signals" and "fishways." But the fashioning of license conditions with respect to those items is left to the Commission, not to the department heads identified in the statute.[9]

2. *Legislative History Confirms The Commission's Paramount Section 4(e) Authority*

The FPA's legislative history demonstrates that the FERC was intended to have paramount authority in determining a licensed project's consistency with the purpose of the federal reservation.

As adopted in 1920, the Federal Water Power Act authorized the Commission to license hydroelectric projects on all federal reservations under the Secretary of Interior's responsibility—national parks and monuments, Indian lands, etc. Section 4(e)'s reservations proviso was just as much a part of the statute then as it is now. Nevertheless, Secretary of Interior Payne, the incumbent in 1920, objected to the fact that national parks and

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[9] Section 18 directs the Commission to require the construction of such lights and signals as the Secretary of Transportation shall direct and such fishways as the Secretary of Commerce shall prescribe. This provision was not part of the original 1920 Water Power Act, and was added to the Act in 1935 at the suggestion of the Commission. See *Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 5423; Feb. 19-28, Mar. 1-13, 1935*, 74th Cong., 1st Sess. 388-391 (1935). As enacted in 1920, § 18 only obligated licensees to comply with rules and regulations of the Secretary of War respecting, *inter alia*, the "maintenance and operation" of "such fishways as may be prescribed by the Secretary of Commerce." 41 Stat. 1073. In its report on the bill which enacted Part I of the Federal Power Act the House Committee on Interstate and Foreign Commerce said the amendment to § 18 *"empowers the Commission* to require a licensee to construct as well as maintain" such fishways as are prescribed. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 25 (1935).

monuments had been made subject to the Commission's licensing jurisdiction. Secretary Payne advocated an amendment to remove those reservations from the statutes. Although the 1920 Act was adopted without this amendment, it was understood that the following session of Congress would remove parks and monuments from the Commission's licensing authority. A 1921 amendment did just that.[10] Under the Court of Appeals' interpretation of Section 4(e), however, the amendment would have been unnecessary. That is because the Commission's Section 4(e) finding would already have been subordinate to mandatory secretarial conditions.

Later, in 1930, the Commission was reorganized as an agency of five independent commissioners. *See* 46 Stat. 797; *Chemehuevi, supra*, at 410 n.15. During Senate hearings on the reorganization various witnesses testified regarding potential conflict between the Commission's authority and that of the three departments having responsibility over federal reservations. *See Investigation of Federal Regulation of Power: Hearings Before the Senate Comm. on Interstate Commerce Pursuant to S. Res. 80 and on S. 3619*, 71st Cong., 2d Sess. (1930).

One of the witnesses addressing this point was O.C. Merrill, a principal draftsman of the Federal Water

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[10] *See* 41 Stat. 1353. The House of Representatives Committee on Public Lands' report on this amendment explains that several days before President Wilson signed the 1920 Act, Secretary Payne

> called attention to the fact that *the language of Section 4 . . . [then 4(d), now 4(e)] placed the national parks and monuments at the disposition of the Federal Power Commission* and that, in his opinion, this ought not to be done; that the jurisdiction over parks and monuments should be retained by Congress, and he so advised the President on June 4, 1920. Owing to the great demand for the legislation . . . an understanding was arrived at to the effect that bills should be introduced at the present session amending the Federal Water Power Act so as to eliminate from its provisions national parks and monuments. The pending bill carries out this understanding.

H.R. Rep. No. 1299, 66th Cong., 3d Sess. 2 (1921).

Power Act (*see Chemehuevi, supra*, at 418 n.24) and the Commission's first executive secretary. Referring to past instances of conflict between the Commission as such and a departmental Secretary who was also a member of the Commission, Mr. Merrill said "[i]t came up at times while I was in the commission, and we took the position that the commission's decision was final." *See Investigation of Federal Regulation of Power, supra*, at 281. Addressing the same point, Mr. Merrill had also explained:

> In my opinion the best way to maintain the jurisdiction and interests of three departments [under an independent commission] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, *leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.*

Id. at 280.

Later in the same hearings the FPC's Acting Chief Counsel, James F. Lawson, further emphasized this point. Mr. Lawson explained that "[t]he Commission now has power to override the head of a department as to the consistency of a license with the purpose of any reservation." *Id.* at 358. An interpretation of Section 4(e) that permits the Commission to override a department concerning the Section 4(e) consistency finding but allows the department to impose conditions on a licensee making the project infeasible would be nonsensical.

This legislative history plainly shows that where the views of the Commission and a departmental Secretary conflict regarding Section 4(e) conditions, the Commission's view takes priority.[11] And that position is con-

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[11] The same theme was repeated in the House of Representatives' hearings in connection with the Commission's 1930 reorganization. *See Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce*, 71st Cong., 2d

firmed by Commission decisions involving these conflicts.[12]

3. *The Court Of Appeals' Interpretation Of Section 4(e) Makes Judicial Review Unworkable And Is In Conflict With The District Of Columbia Circuit's Treatment Of A Parallel FPA Provision*

The Court of Appeals' initial opinion relied on two factors to conclude that there would be effective judicial review of Section 4(e) secretarial conditions. The first was that "any license issued by the Commission which includes conditions propounded by Interior will be subject to review under section 313(b) of the FPA, 16 U.S.C. 825*l*(b)." *See* Pet. App. at 24. In addition, the court said secretarial conditions under "section 4(e) will be reviewable as a final agency action under the applicable provisions of the Administrative Procedures (sic) Act, 5 U.S.C. §§ 701-706." *Id.* at 24-25. On rehearing the court withdrew the second point, recognizing that APA review of the Secretary's conditions was not an available remedy. *See id.* at 32-33.

Sess. (1930). The Secretaries of Agriculture and Interior (Messrs. Hyde and Wilbur, respectively) each addressed this question of conflicting authority under FPA § 4(e). Each indicated that in the case of conflict with one of the departments, the Commission's authority was paramount. *See id.* at 45-46, 48.

[12] *See Pacific Gas & Electric Co.*, 53 F.P.C. 523, 526 (1975) (while Commission gives great weight to conditions offered by the Secretary of Agriculture under FPA § 4(e) in connection with project's use of national forest, terms of license must be based on Commission's judgment and the record); *Pacific Gas & Electric Co.*, 6 F.P.C. 729, 730 (1947) ("the Commission may . . . prescribe reasonable conditions for the protection and support of fish life" in a national forest after considering those "recommended" by the Secretary of Agriculture, Secretary of Interior and State of California); *Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935) (in a case involving Indian lands the Commission "will give great weight to the judgment and recommendation" of the Secretary of Interior but § 4(d) [now § 4(e)] gives the Commission "the sole power and duty" to find, based on the record before it, that the license will be consistent with the reservation's purpose).

The Court of Appeals' plan for judicial review will be cumbersome and prolonged, at best. In the typical case a Secretary's Section 4(e) conditions are presented to the FERC by letter. There is no record or findings to support the conditions. In the past when FERC either adopted or rejected a proposed condition, the agency was obligated under FPA Section 313(b) to support its action with substantial evidence and reasoned findings. Obviously, however, the Commission cannot be expected to present evidence or findings to support a condition with which it disagrees.

The dissenter from the Court of Appeals' decision, Judge Anderson, recognized this dilemma. *See* Pet. App. at 39-41. Noting that secretarial conditions must meet a "reasonableness" standard, Judge Anderson explained:

> I would place the initial reasonableness decision on FERC, for it is, after all, the forum in which the initial factfinding function is vested. FPA § 4, 16 U.S.C. § 797. * * * FERC's written findings of fact and supporting reasoning would then be subject to review in the court of appeals. I believe this procedure would preserve the control of FERC over licensing, and at the same time respect the Secretary's statutory duty to protect the reservations.

Id. at 41.

Judge Anderson's solution is the same one that the Commission has followed for more than 60 years. Aside from its consistency with Section 313(b)'s plan for judicial review, that approach is also the one that best implements the overall scheme of the FPA.[18] It allows re-

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[18] As discussed earlier, the Court of Appeals majority rejected this interpretation on the ground that § 4(e) secretarial conditions are mandatory for the FERC. *But see* 2A C. Sands, *Sutherland Statutory Construction* 417 (1973) ("It can be stated as a general proposition that, as regards the question of mandatory or directory operation, the courts will apply that construction which best carries into effect the purpose of the statute under consideration.") (footnote omitted).

viewing courts to have the full benefit of the Commission's expertise regarding the conditions that are necessary to make the project consistent with the purpose for which the reservation was established.[14] The Court of Appeals majority, in contrast, renders meaningless the Commission's express duty to make the required consistency finding.

But aside from the Commission's expertise, it is charged with balancing various public interest considerations which, of course, would include the United States' fiduciary responsibility to Indian tribes. FERC's licensing obligation requires it to focus on each of the various FPA standards discussed earlier. The Secretary of Interior, on the other hand, is a trustee for Indian reservations and is held to "the most exacting fiduciary standards." *See Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). In fashioning conditions for the protection of a reservation the Secretary can hardly be expected to proceed as an impartial decision maker. On the other hand, because the Commission must be objective, it is in the best position to make the final administrative reasonableness determination regarding proposed conditions.

Finally, the Court of Appeals' decision directly conflicts with the reasoning and decision of the United States Court of Appeals for the District of Columbia Circuit in *Montana Power Co.* v. *FPC*, 459 F.2d 863 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972). The issue in *Montana Power* centered on the appropriate interpretation of FPA Section 10(e), 16 U.S.C. § 803(e). That statute authorizes the Commission to impose annual charges on project licensees where the project uses government-owned facilities or tribal lands within Indian reservations. The statute also provides that the Commission's determination shall be "*subject to the approval* of the Secretary of In-

[14] Thus, Judge Anderson's solution is also consistent with the rationale underlying the primary jurisdiction doctrine. *See Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

terior . . . and the Indian tribe having jurisdiction." But the court ruled that the quoted provision did *not* make the Commission's determination of annual charges subordinate to the views of the Secretary or Indian tribe. *See* 459 F.2d at 873-74. The court explained:

> Considering the applicable statutes together [the Secretary] may approve a rental offered by the [licensee], and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, *the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review* of its determination. As is the situation with the Tribes, the Secretary can participate as a party and avail of the provisions for judicial review.

Id. at 874. The Court of Appeals' inconsistent interpretation of Section 4(e)'s parallel provision is erroneous.[15]

B. In No Event Does Section 4(e) Apply In Relicensing Cases Under The Federal Power Act

1. *Section 4(e) Applies Only To Initial Licensing*

The FPA's requirements for *initial* licenses are quite different from those that apply to *relicensing* after a

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[15] Under the Court of Appeals' ruling it may be impossible to separate conditions authored by FERC from those authored by a departmental Secretary for judicial review purposes. For example, conditions initially authored by FERC may cause a departmental Secretary to propose certain § 4(e) conditions that he had not previously considered, and to omit conditions that originally he had intended. In a case involving an international air transportation route the conceptual impossibility of segregating the portions of the disputed order for which the Civil Aeronautics Board ("CAB") was responsible and those upon which the President had relied in giving his approval led this Court to hold that no part of the order could be ascribed to the CAB and, therefore, no part of the order was subject to judicial review. *See Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). While there is no dispute in this case that all § 4(e) conditions are subject to judicial review, the Court of Appeals' decision will undoubtedly complicate and prolong the process.

project's original license—typically 50 years—has expired. Putting aside the issue of Section 4(e)'s interpretation (see argument A, *supra*), there is no dispute that Section 4(e) applies to *initial* licensing. Nor is there any issue before the Court regarding FERC's determination that this proceeding was to be treated as initial rather than relicensing. *See* Pet. App. at 133-37.[16] The question of whether Section 4(e) applies to relicensing is not, accordingly, a necessary consideration in this case (and, in any event, should first be addressed by the FERC).[17] Nevertheless, it is apparent from examination of the FPA's statutory plan, as explained below, that Section 4(e) does *not* apply to relicensing. It is important, therefore, that the Court's decision make clear that it applies only to the initial licensing at issue here.

2. *FPA Section 15 Governs Relicensing*

Initial licenses are governed by FPA Section 4(e). Under that statute the Commission issues initial licenses "for the purpose of constructing, operating, *and* maintaining" hydroelectric projects. Section 4(e)'s terms clearly contemplate the issuance of a license to construct new project works, as well as to operate and maintain them thereafter, not the issuance of a new license to replace the initial license.

FPA Section 15(a), 16 U.S.C. § 808(a), on the other hand, applies to relicensing. In fact, FPA Section 14(b), 16 U.S.C. § 807(b), directs the Commission to entertain applications for new licenses and agency proposals for

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[16] It is not altogether clear that this is an initial licensing case. The physical facilities being licensed here were already in existence. The Commission merely chose to include a previously constructed upstream dam and reservoir as part of the licensed project works. *See* Pet. App. at 83 and 136.

[17] As with similar statutory construction issues, this one should be addressed in the first instance by the agency responsible for implementing the statute. *See, e.g., FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972).

federal takeover and "decide them *in a relicensing proceeding pursuant to the provisions of section 15.*" [18] And Section 15 provides that where the United States does not exercise its right to take over a project, the commission is authorized to issue a new license to the original licensee or to a new licensee.

Congress never intended that Section 4(e) would apply to relicensing. Unlike initial licensing, relicensing does not change the status quo. At the relicensing stage dams and conduits have already been built,[19] lands have been flooded, and generation and transmission facilities are in place to serve consumers. Moreover, where the project involves a federal reservation, each of these measures previously passed muster under Section 4(e).

Congress, of course, recognized that the considerations confronting the Commission in relicensing would be vastly different from those at initial licensing. Indeed, in contrast to the expansive issues that can dominate initial licensing, Congress intended that relicensing would focus primarily on three concerns: protection of the United States' takeover rights under Section 14, the interest of the original investors in the project, and the interests of consumers who paid for the project through their electric rates and benefited from its fuel-free power. To protect these interests Congress substituted Section

[18] FPA § 14(b) and several other provisions were added to the Act in 1968. *See* 82 Stat. 617. They were intended to deal with problems the FERC would confront as 50-year licenses issued in the 1920's began to expire.

Dicta in *Lac Courte Oreilles Band* v. *FPC*, 510 F.2d 198 (D.C. Cir. 1975), states that § 4(e) applies to relicensing. *Id.* at 210-12. The question was not, however, before the court, had not been raised or briefed by any party, and had not been addressed by the Commission.

[19] In fact, the application of at least one major provision of § 4(e) —the requirement that the Secretary of the Army approve the plans for any dam affecting navigation—obviously makes no sense in the case of an existing project.

15 for Section 4(e) in relicensing proceedings. This intent was clearly reflected in the 1919 Senate report on H.R. 3184, a bill identical in all relevant respects to the one enacted a year later as the Federal Water Power Act. Referring to the provision that became Section 15, the Senate Report explained:

> It is the opinion of practically all those acquainted with investments of this kind that this language is necessary to insure the investment of capital in these great and much needed enterprises. The interests of the Government and public are not impaired. *The works must be continued in operation at the end of 50 years in order that the industries created by them and dependent upon them may not suffer.* Private capital should not be required to do this upon unreasonable terms *nor should its property be confiscated.* Under this provision, if the new license is not accepted, the works will be carried on under the original license from year to year with the Government free to take it over at any time that it may be prepared to do so or to turn it over to a new licensee upon terms that can be agreed upon. *In other words, the Government is free to do what it may desire to do, capital is reasonably sure of a return of its investment, and the public is assured permanent service under its own regulative agencies.*

S. Rep. No. 180, *supra*, at 2.[20]

It should be noted in this connection that the Commission is not required to issue an *initial* license and the applicant is not required to accept that license if it disagrees with the Commission's conditions. At this point the applicant can reject the license with relatively little financial loss. In a relicensing proceeding under Section

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[20] Also, in § 15 relicensing proceedings, FERC updates the terms and conditions of the original license so that the new license conforms to laws enacted subsequent to initial licensing. *See Hearings on H.R. 12698, 12699, Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 69-70 (1968).

15, however, the Commission does not have the option of denying a license, nor is the original licensee free to abandon the project. Indeed, the original licensee would be placed in an untenable position if forced, absent federal takeover, to choose between abandoning a project it had constructed and operated for many years or accepting a license with unreasonable conditions arising at relicensing for the first time.

It was this desire to protect the investment in hydroelectric projects that led Congress to promise a new license under Section 15 on "reasonable terms," absent federal takeover. *See Hearings Before the House Water Power Committee*, 65th Cong., 2d Sess. 27-28 (1918); S. Rep. No. 180, *supra*, at 2. Section 4(e), on the other hand, has no counterpart to this provision. One of the Senate managers for the 1920 Act, Senator Myers, explained the purpose of Section 15's "reasonable terms" requirement as follows:

> It occurs to me that if those words were not in the provision it would be in the power of the Government to refuse to take over a project at the end of 50 years and to tender a new license so prohibitive and *on such unreasonable terms that no one would have it.* * * * I do not believe under those conditions that we could find anybody willing to invest a dollar in a project of this kind. Unless there is some chance of getting the money back at the end of 50 years or getting a continuation of the lease *on reasonable terms* or getting a license from year to year, I do not believe anybody would ever think of engaging in an enterprise under the bill.

See 59 *Cong. Rec.* 1049 (1920).

In sum, FPA Section 4(e) is inapplicable to relicensing under Section 15 of the Act.

C. Where There Are No Project Works Within A Reservation, Section 4(e)'s Reservations Proviso Does Not Apply

The Court of Appeals also held that even where the project works are located outside of a reservation, Section 4(e)'s reservations proviso applies if the project "affects" or in the future "might affect" water rights appurtenant to the reservation. *See* Pet. App. at 25-28. This interpretation is plainly incorrect. It is also unnecessary and will cause substantial uncertainty and considerable potential for protracted litigation under the FPA.

1. *The Reservations Proviso Applies Only To Projects That Occupy Reservation Lands*

Section 4(e) provides for special conditions under which licenses for "project works" "shall be issued *within* any reservation." Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations . . . and other lands and interests in lands owned by the United States, and withdrawn, reserved or withheld . . . ." As the Court of Appeals recognized, these terms describe project works constructed upon or within "reservations" having specific geographic limits.[21] *See* Pet. App. at 26. The Court of Appeals' opinion seems to treat a water right as an extension of the land to which the right is appurtenant. This, however, represents a complete mischaracterization of the nature of a water

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[21] Reservations are created or established by geographical areas, such as surveyed land sections or specific boundaries. *See, e.g.*, 16 U.S.C. Chapters 1 (§ 1 *et seq.*) and 2 (§ 471 *et seq.*) for land descriptions of national parks and forests; and 16 U.S.C. §§ 1132 and 1274 for statutory requirements for establishing boundaries and land descriptions of wilderness areas and wild and scenic river areas. *See also FPC* v. *Tuscarora Indian Nation*, *supra*, at 114 (Congress "intended to and did confine" the definition of "reservation" to "tribal lands embraced within Indian reservations" and other reservations "located on lands 'owned by the United States' ").

right, which is simply a usufructuary right.[22] Dams upstream do not of themselves infringe upon downstream water rights so long as they do not impair the enjoyment of the rights below. Similarly, a diversion of water does not infringe upon a lower water right so long as the lower owner can still exercise his right. Thus, although water rights appurtenant to a reservation may be protected in appropriate judicial proceedings from infringement by persons outside the reservation, those rights do not represent an extension of the reservation boundaries. Project works cannot lie within a water right.[23]

Furthermore, Congress' intent that the reservations proviso apply only when project works would be inside a reservation's territorial boundaries is borne out by the manner in which Congress in 1921 prohibited licensing of project works "*within the limits as now constituted* of any national park or national monument." *See* 41 Stat. 1353. Similar prohibitions were applied to subsequent new parks and additions to existing ones.[24] None of these prohibitions on licensing applied to projects outside of park boundaries even though they might "affect" a park. In 1935 when the Federal Water Power Act was reenacted as FPA Part I, this policy was generalized by amending Section 3(2) to provide that the term "reservations" "shall not include national monuments or national parks." This not only removed national parks and monuments from Commission licensing authority, but

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[22] 1 R. Clark, *Waters and Water Rights* § 53.2 (1967).

[23] Congress was aware that water rights were and would continue to be important in the development and operation of hydroelectric projects. This is evident in FPA § 3(11), which includes "water-rights" in the definition of the term "project," and § 27, which provides that nothing in the FPA may be construed as affecting state laws relating to water rights.

[24] *See, e.g.*, 16 U.S.C. § 45c ("within the limits of [Sequoia National] park") (1926); 16 U.S.C. § 47b (with respect to "lands [described in 16 U.S.C. § 47a] added to the Yosemite National Park") (1930).

also as a consequence removed them from the operation of the reservations proviso. If, on the other hand, the proviso were applied to projects "affecting" reservations, the illogical result would be that "affected" national forests are covered but "affected" national parks and monuments are not.[25]

2. *The Court Of Appeals' Extended Definition Of Reservation Is Unnecessary*

The Court of Appeals enlarged the application of the reservations proviso solely because it believed that the Commission would otherwise be free to defeat a reservation's purpose, such as by granting a license for a project that could turn a reservation into a "barren waste." *See* Pet. App. at 28. This represents a complete misapprehension of the limits on the Commission's authority.

The court overlooked a fundamental fact: the Commission is already required by Section 10(a) of the Act to consider fully all impacts of a proposed project on every legitimate public interest. *See Udall* v. *FPC*, 387 U.S. 428, 450 (1967); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). This necessarily includes any effects on water rights the Court of Appeals sought to include in Section 4(e)'s proviso. Thus, although Section 4(e) authorizes the Commission to license project works which may to some extent interfere with Indian reservations, this authority is subject not only to the requirements of

[25] It should also be noted that there is a substantial difference between occupancy of a reserved area and incidental effects to the reserved area. In enacting the Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*) Congress prohibited the licensing of project works "on or directly affecting" a designated wild or scenic river. But Congress expressly provided that this would not "preclude the licensing of . . . developments below or above a wild, scenic or recreational river area . . . which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968." *See* 16 U.S.C. §§ 1278(a) and 1278(b).

the reservations proviso, when applicable, but also to the obligation of all federal agencies to act consistent with the United States' fiduciary obligations to the Indians.

Indeed in this case the Commission made clear its intention not to interfere with the affected Indian Bands' water rights and included a license condition for that purpose.[26] Nevertheless, if a project license cannot properly accommodate water rights, the Commission's obligations under Section 10(a) may require denial of the license. *Udall* v. *FPC*, *supra*, at 437. In the case of projects "within any reservation," Section 4(e)'s proviso requires a further explicit finding by the Commission. But neither the words of the Act nor legislative history reflects any intention to apply the additional requirements of the proviso to projects located outside the geographical boundaries of a federal reservation.

3. *Enlarging The Application Of The Reservations Proviso Would Inject Unnecessary Complications And Uncertainty Into The Licensing Process*

Finally, the Court of Appeals' extension of the Section 4(e) reservation proviso beyond the geographical boundaries of federal reservations injects substantial uncertainty and an enormous potential for protracted litigation under the FPA.

In this case the Court of Appeals went no further than to state that the three reservations "*may* be affected by the project, as they lie below the project in the San Luis Rey River watershed." Pet. App. at 25. This illustrates the inherent difficulties which arise from the court's interpretation. In effect, the court requires the Commis-

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[26] The water rights of the three Indian Bands that are at issue here are the subject of pending litigation, *see* Pet. App. at 65 and 108, and the Commission included a license condition (Article 28) under which the operations plan for the Escondido project may be modified upon petition by the Bands after completion of the litigation.

sion to comply with the reservations proviso for every reservation that *might*, even remotely, be "affected" by a project. The evidentiary problems of supporting proviso findings for every potential effect would be extensive and the Commission would find it difficult to know when its task was complete. The magnitude and nature of reservation water rights [27] and possibly other appurtenant rights, such as hunting and fishing,[28] could be the subject of prolonged controversy.

For 63 years of administration under the Federal Power Act there has been no need to apply Section 4(e)'s proviso to these interests. The Commission can and has fully protected them under its Sections 6 and 10(g) conditioning powers. If other agencies are now found to have overriding conditioning powers with respect to an as yet undefined class of federal reservations located outside of project boundaries, the future administration of the Act will be handicapped and often governed by narrow interests.

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[27] *See, e.g., United States* v. *New Mexico*, 438 U.S. 696 (1978) (5-4 decision holding, on facts of particular case, that water rights for the Gila National Forest were reserved only for maintenance of timber and to secure favorable water flows, and not for recreation, wildlife, and other purposes).

[28] *See, e.g., Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87-89 (1918) (reservation of islands for Indian tribe impliedly reserved adjacent waters exclusively for Indian fishing), and *United States* v. *Winans*, 198 U.S. 371, 381 (1905) (Indian fishing rights reserved outside boundaries of reservation).

IV. CONCLUSION

For the foregoing reasons we submit that the decision of the court below misconstrues the meaning and application of the Section 4(e) proviso and should be reversed.

Respectfully submitted,

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